Constructionism, labor law and the waiver of rights

Construcionismo, lei do trabalho e renúncia de direitos

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ABSTRACT
Despite of the fact labor relations (from employees standpoint)are similar worlwide, the different legal systems accept (or not)the waiver of rights. This phenomenon can be explained through constuctionism, since any concept will carry "values", according to each society.

Keywords: constructionism, waiver of rights, unequal bargaining.

RESUMO
Apesar de as relações de trabalho (do ponto de vista dos empregados) serem semelhantes em todo o mundo, os diferentes ordenamentos jurídicos aceitam (ou não) a renúncia de direitos. Esse fenômeno pode ser explicado pelo construcionismo, uma vez que qualquer conceito carregará "valores", de acordo com cada sociedade.

Palavras-chave: construcionismo, renúncia de direitos, negociação desigua

1 INTRODUCTION

Labor and employment law are known in the legal, academic, and Brazilian society as a protectionist branch of law from the worker's point of view, due to the unequal positions of the employer and the employee.

Carla Romar[1], in reference to the work of Americo Pla Rodrigues, teaches that

[1] Romar, Carla Teresa Martins Direito do trabalho / Carla Teresa Martins Romar ; coordenador Pedro Lenza. – 5. ed. – São Paulo : Saraiva Educação, 2018. (Coleção esquematizado). Original version:

> "recognizing the natural inequality of the parties in the employment relationship, the legislator was inclined to compensate for this unfavorable economic inequality for workers with legal protection favorable to them, so that Labor Law started the fundamental purpose of leveling inequalities"

Such rationale is natural and automatic for lawyers who are used to Brazilian Labor Courts, but when it is necessary to explain how a labor lawsuit works to a professional who works in another area, or to a foreigner, in fact [this] understanding becomes a little more difficult .

It is not common to hear questions, especially from foreigners, such as "can we sign a release agreement in which the employee declares that everything owed to him has been received and that he will not claim any credit in court?" or, still, "but when the worker was employed he accepted certain conditions, how can he now sue the company?"

If employment relations are the same around the world (since there are employees and employers everywhere), why in certain countries the parties of such relationship are seen as equivalent (or almost so) and, in others, like Brazil, there is in principle (and except for exceptions brought by labor reform) the presumption of imbalance between the parties?

This article will try to analyze this disparity from the point of view of constructionism, whose concept will be addressed in the following topic.

2 CONSTRUCTIONISM

Marcio Pugliesi[2] teaches that

" ao reconhecer a desigualdade natural das partes na relação de trabalho, o legislador inclinou-se para uma compensação dessa desigualdade econômica desfavorável ao trabalhador com uma proteção jurídica a ele favorável, ou seja, o Direito do Trabalho passou a responder ao propósito fundamental de nivelar desigualdades"

[2] Original version: uma concepção construcionista da sociedade consiste em compreender a 'realidade' social como um resultado da ação dos próprios seres humanos nos lindes geográficos e culturais de sua visada sobre o conjunto dos estados de coisas para si acessíveis.(...)
Dessarte, a 'realidade' existente [incluindo todos seus aspectos simbólicos (o Homem é um ser simbolizador); subjetivos; imaginários etc.] deflui das práticas humanas no processo sócio-histórico: quer geograficamente localizado, quer na rede telemática. Incluem-se aí, de pronto, como construções humanas as línguas, religiões, sistemas normativos, ideias em geral etc. Mesmo porque: para a produção de objetos sempre se requer a presença de projetos.
Sendo assim, o construcionismo é necessariamente transdisciplinar – dissolve fronteiras ditas estanques e produz conhecimento evitando as fragmentações redutoras entre as disciplinas componentes das chamadas ciências humanas e/ou naturais, e, ainda, permite compreensão que admite muitos enfoques simultâneos do mesmo problema segundo perspectivas históricas, sociológicas, filosóficas, propensivas, sistêmicas etc. Além disso, abriga o construcionismo sistêmico um outro pressuposto: se historicamente os indivíduos se agregam por efeito de sua falta de programação para enfrentar de imediato à vida (resultado exposto pela etologia); por outra parte esse mesmo fato - o sócio-histórico e cultural (incluindo a linguagem que venha a desenvolver a partir da língua sob a qual tenha nascido) - tem primazia sobre o humano. O propriamente humano representa o domínio do artefato: consiste no conjunto dos objetos, signos, relações e instituições criados pela dialética da cultura e da civilização.

> "A constructionist conception of society consists of understanding social 'reality' as a result of the action of human beings themselves, in the geographical and cultural beauty of their view of the several states of affairs accessible to them.
> (...)
> Thus, the existing 'reality' [including all its symbolic aspects (Man is a symbolizing being); subjective; imaginary etc.] flows from human practices in the socio-historical process: both geographically located and in the telematic network. Languages, religions, normative systems, ideas in general, are readily included as human constructions. Especially because the production of objects always requires the presence of projects.
> Therefore, constructionism is necessarily transdisciplinary - it dissolves so-called boundaries and produces knowledge, avoiding the reducing fragmentations between the disciplines that are part of the so-called human and/or natural sciences, and also allows an understanding that admits many simultaneous approaches to the same problem according to historical, sociological, philosophical, prone, systemic perspectives, etc. In addition, systemic constructionism harbors another assumption: if historically individuals have joined together due to their lack of programming to face life immediately (result exposed by ethology); on the other hand, this same fact - the socio-historical and cultural (including the language that will develop from the idiom under which it was born) - has precedence over humans. The properly human represents the domain of artifact: it consists of the set of objects, signs, relations and institutions created by the dialectic of culture and civilization."

Everything that catches our attention is part of a social relationship.

According to this theory, any construction will carry something we call "values", so there is no description of the world [that is] devoid of values. All conceptions make the described object valuable or not from the point of view of whoever describes it.

Thus, all descriptions carry different forms of life and perspective.

Still, according to the teachings of Ludwing Wittgenstein, the meaning of any word is developed from a "language game".

In this sense, everything we consider part of something external, not from what the subject himself brings to the world, but from the interlocutors of that subject and with whom he relates.

Therefore, intersubjective and interdisciplinary relationships have great relevance in the way the individual constructs his worldview, so that from the individual's statement about what is true, such truth will have power over that subject and will have power over him, influencing the interlocutor.

In this regard, it is worth mentioning the binomial knowledge/power of Michel Foucault[3], in the sense that "at least for the study of human beings, the goals of power and the goals of knowledge cannot be separated: in knowing we control and in controlling we know. "

Still regarding the fact that knowledge comes from the subject's social structure, it is worth mentioning the teachings of Thomas Kuhn mentioned in Stanford Encyclopedia of Philosophy[4]:

Having made all these considerations about what constructionism is, it is possible to note that all existing concepts in a given society come from previous experiences and events, which influence the formation of the concepts.

3 THE CONCEPTS OF UNEQUAL BARGAINIGN POWER AND NO-WAIVER IN BRAZILIAN LABOR LAW

Regarding the origin of Labor Law, Mauricio Godinho Delgado[5] clarifies that

> "The employment relationship, as a socioeconomic and legal category, stems from assumptions raised with the rupture of the feudal productive system, throughout the course of the Modern Age. However, it is only later on, in the course of the Industrial Revolution process, that it will effectively structure itself as a specific category, responding as the main model for connecting the free worker to the emerging productive system.
> (...)
> Labor Law is, therefore, a cultural product of the 19th century and of the economic, social, and political transformations experienced there. All transformations place the subordinate work relationship as the driving force of the productive process that is characteristic of that society."

Among the characteristics that differentiate Labor Law in Brazil from other branches of law is the principle of Protection.

[3] https://plato.stanford.edu/entries/foucault/
[4] https://plato.stanford.edu/entries/thomas-kuhn/
[5] Original version: " A relação empregatícia, como categoria socioeconômica e jurídica, tem seus pressupostos despontados com o processo de ruptura do sistema produtivo feudal, ao longo do desenrolar da Idade Moderna. Contudo, apenas mais à frente, no desenrolar do processo da Revolução Industrial, é que irá efetivamente se estruturar como categoria específica, passando a responder como o modelo principal de vinculação do trabalhador livre ao sistema produtivo emergente.
(...)
O Direito do Trabalho é, pois, produto cultural do século XIX e das transformações econômico-sociais e políticas ali vivenciadas. Transformações todas que colocam a relação de trabalho subordinado como núcleo motor do processo produtivo característico daquela sociedade"

This principle states that the Labor Law intrinsically structures , with its own rules, institutes, principles and presumptions, a system of protection to the under-sufficient part in the employment relationship - the worker - aiming to mitigate, in the legal sphere, the imbalance inherent in the factual existence of the employment contract.

The rationale of the protective principle originates from the imbalance between employee and employer, so that the employee would be the under-sufficient part of the employment relationship.

As Carmen Lucia Rocha[6] points out,

> "The intention, therefore, is that the law will place in unequal positions equal parties considered from a focus that, however, brings deeper and more perverse unequal consequences. While previously the law was intended not to create or allow inequalities, now it is intended to fulfill the function of promoting equalization where possible and with the instruments that it has, including causing certain inequalities so that the result is the same fair balance and material equality and not a merely formal one."

As a result of this "web" of worker protection, other principles also emerge, such as the non-waiver of labor rights, which is particularly important for this article.

As a rule, waiver of the right to sue the employer, regardless of the presence of formal requirements, is repelled by labor rules[7].

Precisely for this reason, upon termination of an employment relationship, even with a senior executive, it is not possible (from a practical, rather than a moral point of view) to sign a release agreement in which the former employee acknowledges that he has received what he was due and by consequence waives the right to sue his former employer.

It is important to mention that after the labor reform it is possible to enter into an extrajudicial agreement which, only after the approval of a judge and in the event of a broad discharge regarding the employment contract, will prevent the employee from filing a labor claim.

[6] Original version: O que se pretende, pois, é que a lei desiguale iguais, assim tidos sob um enfoque que, todavia, traz consequências desigualadoras mais fundas e perversas. Enquanto antes, buscava-se que a lei não criasse ou permitisse desigualdades, agora pretende-se que a lei cumpra a função de promover igualações onde seja possível e com os instrumentos que ela disponha, inclusive desigualando em alguns aspectos para que o resultado seja o equilíbrio justo e a igualdade material e não meramente formal.

[7] Article 9 of Brazilian Labor Code - Acts performed with the objective of distorting, preventing, or defrauding the application of the provisions contained in this Consolidation will be null and void.

Article 444 of Brazilian Labor Code - Contractual labor relations may be the subject of free stipulation by the interested parties in everything that does not contravene the labor protection provisions, the applicable collective agreements and the decisions of the competent authorities.

Even in this hypothesis, there is interference (or at least analysis) by the Labor Court about the settlement.

In practical terms, if a release agreement was signed in which the employee waives the right to sue the former employer, but nevertheless files a labor claim, the employeer will have to present a defense, but the claim will not be dismissed only for the sake of the release agreement.

A similar situation occurs when the employee signs an arbitration clause, [in which it is defined] defining that any conflict will be submitted to an arbitral chamber (waiving the right to file a claim before a labor court), and nevertheless files a labor claim.

What has been seen, at least so far, is the rejection of the arbitration clause, due to the principles of the worker protection and unavailability of labor rights.

That is, both in the situation in which a release agreement is signed at the end of the employment contract when the employee waives the right to file a claim, and in the situation in which the parties, at the beginning of the employment relationship, set forth that any litigation will be resolved through arbitration (thus renouncing the right to file claims before the Labor Court), the waiver is not considered valid.

Much criticism can be drawn from such rationale from the labor courts, which can be said to be orthodox, since in most cases (and save for exceptional cases of bad faith), in the situations described the worker has full discernment of what is being agreed, either because of his educational level or because of the salary he received as an employee.

From the Labor Court's standpoint, workers are seen as lacking discernment as to their basic rights, including citizenship.

Regarding the impossibility of waiver unavailability of rights, which is also seen as an obstacle to the signing of release agreements or the signing of arbitration clauses, it is worth highlighting the important reflection made by Minister Ellen Gracie when deciding the constitutionality of the arbitration law[8]: o jargão aqui é deciding mesmo que

[8] Original version: A leitura que faço da garantia enfocada pelo artigo 5º, XXXV, é de que a inserção de cláusula assecuratória de acesso ao judiciário, em nosso ordenamento constitucional, tem origem e se explica pela necessidade de precatararem-se os direitos dos cidadãos contra a atuação de órgãos administrativos, próprios de regimes autoritários. A arqueologia da garantia da via judiciária leva-nos a verificar que a cláusula sempre teve em mira, preponderantemente, o direito de defesa ante os tribunais, contra atos dos poderes públicos. Por isso mesmo, é que, ineludivelmente, o legislador destinatário da norma que reza: "a lei não excluirá da apreciação do Poder Judiciário lesão ou ameaça a direito

seja sentença final. Em verde, é impossibilidade de renunciar ou indisponibilidade de direito? Impossibilidade de renunciar!

> "My reading of the guarantee comprised by Article 5, XXXV, is that the insertion of an assurance clause for access to the judiciary, in our constitutional order, has its origin and is explained by the need to protect citizens' rights against acting administrative bodies, typical of authoritarian regimes. The archeology of the guaranteeing the judicial route leads us to verify that the clause has always aimed, predominantly, at the right of defense in court against acts of public authorities. For this very reason, it is inevitable that the legislator receiving the rule that reads: "the law will not exclude injury or threat to the right from the Judiciary's assessment" falta o final?

According to the understanding above, we verify that the law will not exclude injury or threat to the law from review by the Judiciary Branch, but the parties may voluntarily do so, which is a perfect legal act. *Embora review seja 'revisão', o jargão para análise judicial é judicial review*

However, there is, in Brazilian labor courts, a very strong resistance to the fact that the party can voluntarily waive its right to sue, which creates the impression that such a waiver in a contract has no practical effect.

The consequence of this is that the party that, in bad faith, exercises the right to sue which it has contractually waived (as long as there is no misinformation), does not suffer any limitation to sue the former employer.

4 THE CONCEPTS OF UNEQUAL BARGAINIGN POWER AND WAIVER OF THE RIGHT TO SUE THE EMPLOYER IN OTHER COUNTRIES

As stated at the beginning of this article, sometimes a foreigner does not understand, at least initially, the reason why it is not possible to guarantee that, in Brazil, when a release agreement is signed waiving the right to file labor claims, there is no guarantee that a lawsuit will not, in fact, be brought (unless there is this agreement is approved in court).

For the purposes of illustration, in the United States, provided that certain formal requirements are met, the employer is allowed to enter into a release agreement waiving the right to claim monies related to the employment contract in court.

Regarding severance payments, it is important to note there is no legal provision for that, as extracted from the US Department of Labor:

> "Severance pay is often granted to employees upon termination of employment. It is usually based on length of employment for which an employee is eligible upon termination. There is no requirement in the Fair Labor Standards Act (FLSA) for severance pay. **Severance pay is a matter of agreement between an employer and an employee** (or the employee's representative). The Employee Benefits Security Administration (EBSA) may be able to assist an employee who did not receive severance benefits under their employer-sponsored plan. Please contact EBSA if you have any questions.[9]"

If there is an intention or provision for payment of severance pay, employmnet law doctrine recommends the following:

> "Increasingly, employers are requiring that employees sign a release and waiver of claims as consideration for any severance benefits. If the severance plan does not require an employee to sign a release as a condition for the receipt of severance benefits the employee should consider amending the severance plan to add that requirement. There is no more effective way to limit litigation challenging a RIF than requiring employees to sign a release as a condition for receiving severance benefits. Unfortunately, there are numerous cases where employees take the money and then sue the employer for wrongful discharge or other assorted wrongs[10]."
> (…)
>
> Some of the most important issues involving the validity of releases arise under the Age Discrimination in Employment Act (ADEA). The ADEA requires that releases signed by employees over the age of 40 comply with the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C, §626 (f). The OWBPA requires, for example, that employers allow employees up to 45 days to consider whether to sign a release in a group layoff situation. Moreover, in an effort to provide employees with information that will allow them (and their attorneys) to make an informed decision relating to the release, employers must attach certain specified and somewhat burdensome information"

As it turns out, as long as the rules related to the information provided to the employee about what is being signed are obeyed, with a period of up to 45 days for analysis in certain cases, the waiver of the right to sue is fully valid, only questionable if there were problems related to defect of consent or information provided

Provided that the conditions established by law are met and the duty to provide information (and the good faith in providing the information) has been met, it is entirely possible that an employee, when entering into an out-of-court settlement, waives the right to sue in the United States.

[9] https://www.dol.gov/general/topic/wages/severancepay
[10] Fundamentals of employment law, page 353

Regarding waiver of the right to sue due to arbitration clause, the vast majority of countries also admit it.

According to an excerpt from a decision by Judge Enoque Ribeiro dos Santos,

> "a) In Germany, the arbitrator exercises public function in institutions of an extrajudicial nature. Collective Contracts of a legal nature are subject to arbitration. And those of general scope are subject to free negotiation. In Germany, a Commission consisting of workers or Court Delegates who work with the internal organization of the company prevails.
> b) In Spain, Law No. 36/98 defines that, by means of the arbitral convention, the parties are bound by the arbitral decision, excluding from the Judiciary Branch the questions submitted to the arbitrator.
> c) In France, may provide for a contractual arbitration procedure (arts. L-525-1 to L-525-9). Thus, arbitration is an act of will of the representatives of the categories.
> d) Australia and New Zealand adopt the compulsory arbitration system.
> e) In Mexico, most labor conflicts are resolved by the Conciliation and Arbitration Board, which belongs to the Executive Branch. So, here we have a public arbitration not exercised by the Judiciary, but by the Executive Branch
> f) In Chile, arbitration was instituted by Law no. 19,069/91. Arbitration is optional and can take place during any stage of collective bargaining; but is mandatory, however, in conflicts with strikes in essential activities.
> g) In Argentina, arbitration was fostered by the Ministry of Labor through Law no. 14,786/58; after an unsuccessful mediation attempt, the mediator invites the parties to submit to arbitration, the arbitration award having the same effects as collective agreements. There is also equity in conflicts such as wages, working conditions, which are not fixed by law.
> h) In Uruguay, the validity of arbitration clauses is recognized since the Treaty of Procedural Law of 1889. Subsequently, the country was the first, among MERCOSUR Members, to ratify international agreements on arbitration.[11]

[11] Original version: Na Alemanha, o árbitro exerce função pública em instituições de natureza extrajudicial, os Contratos Coletivos de natureza jurídica são sujeitos a arbitragem. E os de âmbito geral são submetidos à livre negociação. Prevalece, na Alemanha, uma Comissão formada por trabalhadores ou por Delegados Judiciais que funcionam junto à Organização Interna da Empresa.
b) Na Espanha, A Lei nº 36/98 define que por meio da Convenção arbitral as partes obrigam-se ao juízo arbitral, excluindo do Judiciário as questões submetidas ao árbitro.
c) Na França, pode-se prever um procedimento contratual de arbitragem (arts. L-525-1 a L-525). Assim, a arbitragem é um ato de vontade dos representantes das categorias.
d) Austrália e Nova Zelândia adotam o sistema arbitral compulsório
e) No México a maior parte dos conflitos trabalhistas têm solução pela Junta de Conciliação e Arbitragem, que pertence ao Poder Executivo. Então, temos aqui uma arbitragem pública não exercida pelo Poder Judiciário, mas sim, pelo Executivo.
f) No Chile, a arbitragem foi Instituída pela Lei n. 19.069/91. A arbitragem é facultativa e pode ocorrer durante qualquer fase da negociação coletiva; obrigatória, no entanto, nos conflitos com greve em atividades essenciais.
g) Na Argentina, a arbitragem foi promovida pelo Ministério do Trabalho através da Lei n. 14.786/58; após tentativa frustrada de mediação, o mediador convida as partes a que se submetam a uma arbitragem, tendo o laudo arbitral os mesmos efeitos das convenções coletivas. Existe, também, a equidade sobre conflitos como salário, condições de trabalho, que não sejam fixados por lei.
h) No Uruguai, reconhece-se a validade de cláusulas arbitrais desde o Tratado de Direito Processual de 1889. Posteriormente, o país foi o primeiro, entre os Membros do MERCOSUL, a ratificar os acordos internacionais relativos à arbitragem.

As can be seen, in many other countries it is entirely possible for the worker, provided he is informed and aware of the situation, to waive the right to sue his employer, both in a release agreement and in an arbitration clause.

Opposite from what happens in Brazil, the will of the parties is respected, and, unless there was a problem regarding the information about the release agreement, what was agreed must be fulfilled.

In this regard, it is again necessary to quote bring the teachings of Minister Ellen Gracie in the vote regarding constitutionality of the arbitration law:

> "That is why, especially in international trade relations, the country was at odds with most jurisdictions, to the point of making it difficult to conclude transactions, given the inexistence of mechanisms capable of promoting quick and specialized solutions that current trade imposes and to compel Brazilian companies, in the vast majority of opportunities, to accept arbitration in foreign countries and according to their rules.
> To deny application of the arbitration clause is the same as erecting as privilege of the defaulting party escaping [the avoidance of] submission to the expedited way of resolving the dispute, a mechanism which it has freely chosen when drawing up the original contract in which this condition is inserted. It is to give the recalcitrant party the power to cancel a condition that - given the nature of the interests involved - may have been a basic consideration in the formation of the agreement (...)[12]"

In order to protect the underprivileged, we often observe the favoring of those who do not honor their contractual arrangements, in total mismatch with objective and subjective good faith.

5 CONCLUSION

In view of the above, we observe that the protection of the worker and his position as the ever under-sufficient party in the employment relationship, instead of the party that must honor agreements (as long as there was no defect of consent), even when it means a waiver to sue the employer (in a release agreement context) is a construction of the legal

[12] Original version: Por isso, especialmente nas relações de comércio internacional, o país destoava da maior parte das jurisdições, a ponto de dificultar-se a conclusão de transações, ante a inexistência de mecanismos capazes de promover as soluções céleres e especializadas que a atualidade do comércio impõe. E a levar, na grande maioria das oportunidades a que as empresas brasileiras se viessem a ser compelidas a aceitar a arbitragem em países estrangeiros e consoantes suas normas.
Negar possibilidade a que a cláusula compromissória tenha plena validade e que enseje execução específica importa em erigir em privilégio da parte inadimplente o furtar-se à submissão à via expedita de solução da controvérsia, mecanismo este pelo qual optara livremente, quando da lavratura do contrato original em que inserida essa previsão. É dar ao recalcitrante o poder de anular condição que – dada a natureza dos interesses envolvidos – pode der sido consideração básica à formação da avença(...)"

system of each country, since employment relations, with different regulations, exist worldwide.

The lessons of constructionism in the sense that any concept will carry something we call “values”, help us understand that labor standards are not always loaded with the protection that exists in Brazil.

From the three-dimensional theory of law, according to which for each fact society assigns a value and from there the norm arises, it can be inferred that the protectionist character of Brazilian labor law comes from a history of labor exploitation (and, why not say it, exploitation of the country as a whole, since 1,500), which may not have occurred so strongly in other nations where work and entrepreneurship have been more valued.

This reflection could explain why labor relations are so specific and standardized in Brazil, contrary to what happens around the world, which sometimes makes it difficult for companies to establish here, contributing to the country's economic growth.

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